IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 218 OF 2006

Shri Rafael Fernandes
(Since deceased represented
by his legal heirs)
1. Shri Pascoal Fernandes

2. Smt. Bernadina Fernandes

3. Shri Alex Fernandes

4. Smt. Shanti Fernandes

5. Smt. Rosy Fernandes,

All r/o. H. No. 1155,
Muxiwaddo, Curtorim,
Salcete, Goa. ..... Petitioners

V e r s u s

1. Smt. Terezinha Rodrigues

2. Mr. Anthony Rodrigues

3. Mrs. Concy Anthony Rodrigues

4. Mr. Rosario Rodrigues

5. Mrs. Elida Rodrigues

6. Mrs. Sylina Rodrigues

7. Mr. Austin Rodrigues

8. Mrs. Coinesao Rodrigues

9. Mr. Michael Rodrigues
Both r/o. Odd Bhat,
Benaulim, Salcete, Goa.

10.Mrs. Milagrina Sequeira

11.Mr. Joseph Sequeira,
Both r/o. Cormugal
Curtorim, Salcete, Goa.

12.Mrs. Rosy Fernandes

13.Mr. Seby Fernandes
Both r/o. 1st Ward, Colva,
Salcete, Goa. ..... Respondents

Shri N. K. Sawaikar, Advocate for the Petitioners.

Shri A. F. Diniz, Advocate for Respondent no. 1.

CORAM: N. A. BRITTO, J.

DATE: 13th July, 2006.

ORAL JUDGMENT

Rule. By consent, rule is heard forthwith.

2. The petitioners are the Judgment debtors in Execution proceedings bearing no. 29/1994, arising from R.C.S. No. 293/1991/D, and are admittedly the mundkars of the respondents. In this petition, the

petitioners, (JDs for short), challenged the Orders dated 29.09.2005 and 13.04.2006 of the learned Civil Judge, Junior Division, Margao, in the said Execution Proceedings. In fact, it has been submitted on behalf of the respondents (DHs for short), that the JDs did not challenge the first Order dated 29.09.2005, by which the learned executing Court had ordered a Commissioner to be appointed to demarcate the area of the house admeasuring 120 square metres and cowshed of 23 square metres and only when by subsequent and consequential order was made appointing Shri Moniz, a Civil Engineer, as a Commissioner, that this petition has been preferred by the JDs. Some bare facts are required to be stated to dispose of this petition.

3. By Order dated 31.10.1988, the JDs were declared the Mundkars of their dwelling house bearing no. 1155, situated in survey no. 19/1 of Village Curtorim, to the extent of 143 square metres in area i.e. 120 square metres of the house and 23 square metres of the cowshed.

4. Subsequently, the Decree Holders filed R.C.S. no. 293/91/D, against the JDs, which was partly decreed by the trial Court but in appeal, was decreed in toto as a result of which the JDs were ordered to demolish

the structures/constructions beyond the area of 120 square metres of the house. The Judgment/Decree of the learned Civil Judge, Junior Division, in R.C.S. no. 293/91/D, as confirmed in R.C.A. no. 38/92, has become final as no further proceedings against the same were taken, and as a result, the Decree Holder initiated Execution Proceedings to carry out the demolition of the structures/constructions beyond the plinth area of the dwelling house of the JDs, admeasuring 120 square metres as per the Decree. In the said proceedings, that the Order dated 29.09.2005 came to be made by the learned Civil Judge, Junior Division, in which the learned Civil Judge ordered the appointment of a Commissioner to demarcate the said area of the house admeasuring 120 square metres and cowshed of 23 square metres and by the subsequent order, appointed Shri Moniz, a Civil Engineer for the said purpose.

5. On or about 28.06.1999, the JDs had filed an application to the Mamlatdar, Margao, under Section 16 of the G.D.D. Mundkar (Protection from Eviction) Act, 1975, ('*Act*' for short), for purchase of an area of 5 metres around their dwelling house. At this time, it is conceded that the JDs showed the area of their dwelling house as 120 square metres and 23 square metres of their cowshed. However, the learned Mamlatdar by his

Order dated 07.04.2004, was pleased to hold that the area of the mundkarial dwelling house of the JDs was 210 square metres and open land i.e. 5 metres around the house, was 227 square metres and, therefore, the JDs were entitled to purchase an area of 437 square metres. This finding was based on a plan drawn by a Surveyor after inspection. The DHs carried an appeal against the said Order of the Mamlatdar dated 07.04.2004 to the Deputy Collector and SDO, Margao, and the learned Deputy Collector was pleased to set aside the said Order and remand the case to the Mamlatdar with a direction to correct the plan after deciding about the structure of the JDs, which is projecting outside the demarcating area. The learned Deputy Collector also directed the Mamlatdar to take note of a Circular issued by the Revenue Department dated 17.03.2004. Against the said Order of the learned Deputy Collector, the JDs have preferred a revision before the Administrative Tribunal, which is pending.

6. The learned Counsel Shri Sawaikar, on behalf of the JDs has submitted that the issue of the extent of the mundkarial house of the JDs is pending before the Revenue Authorities and so also the application filed by the JDs for purchase, and in such a situation, the learned executing Court ought not to have proceeded with the Execution application and in fact

ought to have stayed its proceedings till the matter was decided finally by the said Revenue Authorities. Shri Sawaiker has further submitted that although the order of the Mamlatdar has been set aside by the Deputy Collector, it is for the Mamlatdar to decide to what extent is the dwelling house of the JDs i.e. whether it is 120 square metres as previously decided by the Mamlatdar by Order dated 31.08.1998 or subsequently found by the Surveyor admeasuring 210 square metres. In support of his submission, learned Counsel Shri Sawaiker, has placed reliance on the Judgments of this Court in the case of ***Shantaram Babani Xete Curtorkar & anr. v. Vishnu Babani Xete Curtorkar & anr. (1989 (2) G.L.T. (167), Subha Venkatesh Kamat v. Shri Vasu Naik & Ors (2001 (1) G.L.T. 3)*** and ***Prabhaker Datta Buriye v. Gabriel Romao & anr. (2001(Supp. 2) Bom.C.R. 833)***. Shri Sawaiker has submitted referring to the last Judgment that the facts in this case were very similar to the said case of ***Prabha Datta Buriye*** (supra).

On the other hand, Shri Diniz on behalf of the DH, has submitted that the correct position in law was decided by this Court in the case of ***Smt. Rachel Rato & Ors. v. Smt. Inacinha Carvalho & Ors. (1998 (1) G.L.T. 212),*** wherein this Court held as under:-

"Merely because under the Mundkar Act the mundkar is entitled to purchase 300 sq.metres or 5 metres around the outer wall of his dwelling house in the panchayat area or 2 metres around the house in municipal area, that by itself does not create any right in favour of the mundkar to cause extension or encroachment in the said area unless and until the same is purchased and transferred in their favour after complying with the requirements and formalities of purchase under the Mundkar Act. Till the certificate of transfer of ownership of this area is not issued by the Collector under the Mundkar Act consequent upon payment of the price of the area same, a mundkar is not entitled to carry out any construction in the area around his house. This is further clear from the Section 7 of the Mundkar Act itself which clearly provides that a mundkar is entitled to maintain, repair, and improve his dwelling house without increasing the plinth area of his house, in any manner, in the course of such improvement, repair or reconstruction. Further Section 6 of the Mundkar Act provides that any loss caused to the bhatkar on account of any activities on the part of the mundkar around his house, the bhatkar is entitled for compensation and also entitled for injunction

> against the mundkar from causing any harm or loss to the bhatkar by such activities of mundkar. Harmonious reading of all these provisions in the Mundkar Act along with Section 15 and 16 clealy shows that no right of ownership or any other entitlement is created in favour of a mundkar in respect of any area around his house including the area covered by 5 metres or 2 metres or 300 square metres or 200 square metres as the case may be unless and until the said area is duly purchased by the mundkar."

7. In my view, the decisions in the case of ***Shantaram Babani Xete Curtorkar*** (supra) as well as ***Prabhaker Datta Buriye*** (supra), were rendered in totally different fact situation then prevailing in this case and, therefore, would be inapplicable to the case at hand.

8. In my view, the Orders of the learned Civil Judge, first directing a Commissioner to be appointed to demarcate the area of the house admeasuring 120 square metres and cowshed of 23 square metres and the next appointing an Engineer as a Commissioner, could not be faulted. The fact that the JDs are the Mundkars of the DHs, was never disputed so also

the extent of their dwelling house, which way back on 31.08.1998, was held to be of an area of 120 square metres and a cowshed of 23 square metres. When the JDs filed an application for purchase under Section 16 of the Act, the JDs also represented to the Mamlatdar that their house was admeasuring 120 square metres and their cowshed 23 square metres and if that is so, one fails to understand as to how the learned Mamlatdar could ever come to the conclusion that the area of the dwelling house of the JDs was 210 square metres when that was not the case of the very JDs at the time of filing the said application. As far as the extent of the dwelling house of the JDs, the said issue has become final with the finding of the learned Civil Judge, Junior Division, as modified by the learned District Judge, in R.C.A. no. 38/1992. All that the learned Civil Judge was doing by the impugned Orders, was giving effect to the Decree passed against the JDs which had attained finality. In my view, considering the facts of the case, it was not at all necessary for the learned Civil Judge, to have stayed further proceedings in the execution of the said Decree, once it was held that the extent of the dwelling house of the JDs was 120 square metres and 23 square metres of the cowshed and the extensions/constructions beyond that area being unauthorized which were liable to be demolished, without in any way, affecting the protection given to the JDs under the relevant provisions

of the said Act.

9. In view of the above, I find there is no merit in this Writ Petition, consequently, the same is hereby dismissed.

Rule discharged.

N. A. BRITTO, J.

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